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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. KEITH RODE, Defendant.	CR-12-00888-EJD UNITED STATES' SENTENCING MEMORANDUM Sentencing Date: July 9, 2015 Time: 1:30 PM Court: Hon. Edward J. Davila

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The defendant, Keith Rode, is scheduled to be sentenced on July 9, 2015. In December 2014, Rode pleaded guilty to Count Two of the Indictment. Count Two charged him with Mail Fraud.

In advance of the sentencing hearing, the United States hereby files this Memorandum to address the offense conduct and the calculation of the Sentencing Guidelines, as well as to advise the Court of its sentencing recommendation. For the reasons set forth herein, the United States agrees with the United States Probation Office's loss calculation contained in the Presentence Report ("PSR"), and we agree with the sentencing recommendation set forth in the PSR. Furthermore, the United States believes Probation properly calculated the applicable United States Sentencing Guidelines ("U.S.S.G.") in the PSR.

In the end, we request that the Court sentence the defendant to a term of imprisonment of 78 months. The United States also requests that the Court impose a three-year term of Supervised Release. In addition, the United States requests that the defendant be ordered to pay to the victims restitution in the amount of $32,880,811.82, joint and severally liable with his co-defendants. Finally, in lieu of forfeiting specific property, the Court should order a money judgment. This money judgment should read: a sum of money equal to $32,880,811.82, representing the gross proceeds obtained as a result of the offense during the period of involvement.

I. Offense Conduct

This Court is familiar with the facts of this case. In addition to presiding over the three guilty pleas by the defendants in this case, the Court presided over Christopher Luck's two-day sentencing hearing, and John Geringer's sentencing hearing. Should the Court wish to reacquaint itself with specific facts, the United States refers the Court to the United States' Sentencing Memorandum filed in advance of Christopher Luck's January 2015 sentencing hearing. See Docket No. 117. Therefore, the government will limit its factual discussion to facts relating to Keith Rode's role in this fraud.

Rode had experience in accounting and taxes. By combining his skills with Geringer's and Luck's, the GLR partners sought to create and manage an investment company. Geringer and Luck recruited investors with promises of high returns, with investments divided 75% into equities and 25% direct company investments. In fact, investigation has confirmed, and through their guilty pleas the defendants' have admitted, that Geringer and Luck misled investors regarding the Fund's performance and asset allocation. Investigation has also confirmed, and Rode admitted, that Rode knowingly mailed misleading account statements, fund performance statements, and tax statements to investors. Geringer admitted, both in 2009 and through his guilty plea, to defrauding his partners by investing substantially more money in the private companies, inflating his earnings from equity trades, and initially hiding this information from Luck and Rode, and continuing to hide this information from the investors. After Geringer admitted his fraudulent conduct to Luck and Rode in 2009, Luck and Rode knowingly joined the conspiracy to defraud GLR's investors.

On March 9, 2012, the FBI interviewed Rode at his place of employment in Wisconsin. Rode confirmed that he is a C.P.A., and works for a consulting firm. Back in 2002, Rode was employed in Northern California by KPMG. While living in the Bay Area, Rode met John Geringer and Chris Luck. Geringer was in the investment business, working with stocks and securities. Luck worked in marketing and managing start-up companies. The three friends decided to form the investment firm, Geringer, Luck & Rode, LLC. Each with an initial equal investment of $2,000, the three became equal partners. Rode claimed that this was the only money any of them put into the company.

With his investment background, Geringer was responsible for directing and managing all of GLR's investments. Luck was charged with marketing the company. Rode handled the accounting. Specifically, Rode stated that he completed the quarterly statements, disbursed the Schedule K-1s and 1099s, and completed the necessary tax filings. Rode had no background in investments or fund management, so, Rode stated, the vast majority of GLR's work and decision making were done by Geringer or Luck. Due to Rode's minimal involvement in GLR, his yearly compensation was smaller than either Geringer's or Luck's. According to Rode, his compensation ranged from $16,000 in 2011 to $80,000 in 2008.

In 2003, Rode moved to Wisconsin to begin working for a consulting firm. After the move, Rode maintained his "silent partner" and accounting roles in GLR. Rode spoke with Geringer and Luck on a regular basis, but had not seen them since approximately 2008.

Rode estimated that the Fund had annual returns of approximately 15% - 16% since its inception. Rode believed that all of the Fund's success was due to Geringer's investment talents, particularly at "shorting" stocks. Due to the Fund's success, a prospective investor was required to invest a minimum of $100,000. Rode estimated that the Fund had 65 or 70 clients.

The FBI showed Rode several documents, including GLR's Performance History (Rode claimed the returns were inflated), 2009 GLR Growth Fund Asset Allocations (Rode believed the asset allocations were correct – the majority of the holdings were supposed to be in large-cap stocks), GLR Quarterly Statement (Geringer told him to put "Member NASD and SEC approved" on this document), and GLR Marketing Bullet Points (he believed it was true that no GLR customer had ever lost money).

Through Rode's guilty plea, he admitted his role in creating GLR quarterly statements for investors. Rode explained that he manually generated these statements in Excel with information provided to him by Geringer via e-mail or mail. Geringer routinely provided Rode with copies of check registers, year-end brokerage account statements, IRS 1099s, a spreadsheet containing investor information, and documents showing the Fund's annualized rates of return. Rode also obtained monthly bank statements via mail, and eventually got Internet access to the bank accounts (at Santa Cruz County Bank). Rode used Quickbooks to manage the accounting, taxes, and financial statements for the Fund. Rode personally reconciled all the bank statements, investor account information, IRS schedule K1s, and other Fund records. Rode also produced the tax returns for GLR, the Fund, and some GLR investors each year. The rate of return shown on quarterly statements was provided by Geringer on a quarterly basis, but the figure was annualized. Rode admitted that Geringer often provided to him the rate of return verbally without any supporting documentation to show how he had arrived at this figure. Geringer told Rode that he calculated this number using the mark-to-market accounting method. Once Rode completed the quarterly statements, Rode would mail them to each investor. Rode would also prepare and e-mail a copy of the quarterly statement spreadsheet with updated information to Geringer and Luck. Since the Fund's inception, Rode could not recall ever seeing or reporting a negative annualized rate of return. Rode stated that the K1s reflected the year-end contracted rate of return shown on the quarterly statement.

Also through his guilty plea, Rode acknowledged that in 2009, sometime after the filing of the 2008 tax return, he received a telephone call from Geringer and Luck. During this call, Geringer admitted to Rode and Luck that he had been manipulating and falsifying trading activities for the Fund, and that Geringer had provided his partners with inaccurate brokerage statements. Geringer also admitted that the Fund did not have enough assets to cover a large disbursement request from an investor who had invested $12 million. To avoid a civil lawsuit, Rode stated that Geringer requested each partner put back into the Fund approximately $1 million of their $1.6 million disbursement.

After this phone conversation, Rode and Luck had a separate conversation without Geringer where they discussed how to fix the situation. They decided rather than close the Fund, they would focus their efforts on the existing investments into MediaTile and DDNI in the hopes that they could sell these companies and make the investors whole. Rode said that other than limiting Geringer's trading activities, he and Luck took no action regarding Geringer's fraud, and did not question him further about his fraudulent activities. Since Rode and Luck did not have the necessary licenses, they did not feel they could continue the Fund without Geringer.

The impact this fraud had on the scores of victims is as varied as the victims themselves. In story after story, victims were persuaded to invest in GLR because they were told that Geringer would be an active trader who monitored and traded daily. Nearly every victim has stated that he or she invested because they valued the Fund's allegedly diversified portfolio. These victims believed the Fund was profitable, because of the statements Geringer or Luck personally made to them, as well as by relying on misrepresentations contained in the account statements that were mailed by Rode to the victims.

II. Method of Calculating Loss

The Court should adopt the same method of calculating Rode's loss number, as it used to calculate Luck's loss number. Luck and Rode are culpable for all victim losses incurred after their discovery of the fraud, and their knowing participation in the fraud. Luck and Rode discovered the fraud around May 1, 2009. Therefore, Luck and Rode should be held responsible for all investor losses incurred post-5/1/2009.

To properly determine the GLR fraud scheme loss under U.S.S.G. § 2B1.1, the government has calculated the GLR loss from the beginning of the Fund through 5/1/09 ("time period one"), and the GLR loss from 5/1/09 to the end of the fraud scheme in 2012 ("time period two"). Geringer's loss is calculated by adding together time periods one and two. Rode's loss, just like Luck's loss, is limited to time period two – the 5/1/09 and after loss number, but nothing before 5/1/09.

There are two ways to calculate time period two, because many investors contributed and also received money back from GLR before discovery of the fraud. Although the government has the burden of proving the amount of loss, the defendant has the burden of proving that he is entitled to a credit against the loss amount. *See United States v. Howard*, 894 F.2d 1085, 1090 (9th Cir. 1990) and *United States v. Hammer*, 3 F.3d 266, 272 (8th Cir. 1993). According to U.S.S.G. Application Note 3(E)(i) of § 2B1.1, credits against loss include the fair market value of property returned and services rendered by the defendant before discovery of the fraud.

Obviously, money the victims received back (before discovery of the fraud) is a proper loss offset, but because of the relevance of each time period, credits are determined in conjunction with when an investor invested and received money back. For instance, if one invested in time period one (before 5/1/09), but received money back in time period two (after 5/1/09), what is the proper way to calculate her investment and offset? First, her initial investment is a "Geringer" loss. In other words, this is a loss amount attributable only to Geringer. That seems to be the easy question. Next, is the money she received back a time period two offset, making it a Rode loss amount reduction? For a few reasons, the government believes the answer is no. First, if post-5/1/2009 refunds to pre-5/1/2009 investments can reduce Rode's loss amount, then theoretically Rode's loss could become a negative number. This calculation method, referred to as Scenario 1 in the loss figures the government shared with the defense and Probation, is not accurate. In the end, the total loss amount under Scenario 1 is roughly $14 million.[1] The Scenario 1 accounting method less accurately calculates the proper post-5/1/2009 loss figure, than if we match distributions to investments.

Put another way, if we unite distributions made to investors with the original date of the investment, we obtain a more accurate picture of the loss suffered by the victims of this fraud. When we follow this method – known as Scenario 2 in loss figures we have shared with the defense and Probation – if an investor invested pre-5/1/09, and received a distribution back post-5/1/09, we credited that distribution to the pre-5/1/09 world, not the post-5/1/09 world. In the end, using the Scenario 2 accounting method, Rode is responsible for a total, unreimbursed loss amount of $32,880,811.82.

[1] Once again, Scenario 1 presumes that distributions back to investors count as an offset against loss regardless of when the distribution is made.

Using Scenario 2's loss calculation is also consistent with Ninth Circuit precedent. Scenario 2 is similar to the "net loss method" applied by the Court in *United States v. Orton*, 73 F.3d 331 (9th Cir. 1996). In Orton, the Court conducted a detailed accounting of the losses incurred by each victim. The amount of loss was calculated by totaling the net losses of all victims who lost all or part of the money they invested. Ninth Circuit precedents, including *Orton* and *United States v. Van Alstyne*, 584 F.3d 803 (9th Cir. 2009), explain that money returned to victims, even Ponzi-scheme victims, should be a credit against loss up to the point of his/her initial investment. Money returned to victims in excess of her initial investment is not properly credited against other victims' losses. United States v. Van Alstyne, 584 F.3d at 817-18.

This method is different than this Circuit's prior "risk theory of loss" described in *United States v. Munoz*, 233 F.3d 1117, 1125 (9th Cir. 2000). This previous loss calculation method reasoned that the goal in sentencing is, "…to deter criminals from engaging in illegal behavior, such as making fraudulent or misleading statements, that deliberately leads unwitting investors to put their money at risk. A Ponzi scheme, in which new investor funds are used to pay returns to prior investors, creates a situation where the business will inevitably collapse at the expense of the investors. If it does not collapse, it is usually by luck alone. Thus, whether a Ponzi scheme produces some value for the investors is irrelevant to calculating the intended loss." *United States v. Munoz*, 223 F.3d at 1126. In overruling *Munoz*, Ninth Circuit precedent, and the Guidelines at § 2B1.1 cmt. n.3(F)(iv) make it clear that returns to investors up to the amount invested do not count as losses. What remains is the government's contention that Rode should not benefit from returns to investors, when those investors' initial investment-losses are not counted as losses during his time period, especially when the government's loss calculation, using actual and not intended loss, only seeks to hold Rode responsible for the time period of his active participation in the fraud, and not the reasonably foreseeable harm caused by his co-conspirators.

III. Guidelines Calculations

Pursuant to the United States Sentencing Guidelines, which are advisory after the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005), the defendant has a total offense level of 31. [PSR ¶ 51.] The defendant's base offense level is 7. [U.S.S.G. §2B1.1 and PSR ¶ 40.] The base offense level is increased by twenty-two (22) levels, to 29, due to the amount of loss involved in the offense. [U.S.S.G. § 2B1.1(b)(1)(L) and PSR ¶ 41.]

Pursuant to U.S.S.G. § 2B1.1(b)(2)(B), the offense level is increased by four levels due to the number of victims, namely 99 victim-investor groups (investor groups count a multiple member family of investors as single investor group), harmed by this scheme. [PSR ¶ 43.]

Under § 2B1.1(b)(19)(A)(ii), if the offense involved a violation of securities law and the defendant was an investment advisor or a person associated with an investment advisor, the defendant's offense level is increased by four levels. [PSR ¶ 42.]

The defendant's lesser role in this offense falls between those roles described in U.S.S.G. § 3B1.2 (a) and (b). Rode did not recruit investors, and had little to no control over the false statements Geringer and Luck made to investors in order to encourage an investor to invest with the Fund. Rode's role in this scheme was centered around the account statements he mailed to Fund investors. These account statements led the investors to believe that the Growth Fund was stable, and performing as expected. Rode's mailings provided a false sense of security to the investors, and caused this fraud scheme to last longer than it would have had Rode mailed truthful statements or corrected past misleading statements. Therefore, the defendant's lesser role in this offense results in a three level reduction. [PSR ¶ 45.]

The defendant has demonstrated an acceptance of responsibility for his crimes, and, therefore, he is entitled to a three point reduction for acceptance of responsibility pursuant to § 3E1.1, resulting in a total offense level of 31.

The government and the Probation Officer calculate that the defendant has zero criminal history points, and therefore, falls into Criminal History Category I. [PSR ¶ 56.] Total offense level 31 indexed with a Criminal History Category of I yields a guideline range of 108 – 135 months imprisonment.

A. Loss Calculation

The amount of loss for which Rode is responsible is $32,880,811.82.2 The applicable United States Sentencing Guideline for calculating the amount of loss caused by this fraud is U.S.S.G. § 2B1.1.

[2] As the government did at the time of the sentencing hearings for Geringer and Luck, the government has already provided to the Court a binder that contains the supporting documentation for the loss figure. These documents were long ago provided to the defense in discovery, but the government has also provided a copy of this binder to the defense in advance of this sentencing hearing.

This Guideline requires that the Court "make a reasonable estimate of the loss." U.S.S.G. § 2B1.1 cmt. n.3(C). "Actual loss" is defined as the "reasonably foreseeable pecuniary harm that resulted from the offense," meaning monetary harm "that the defendant knew or, under the circumstances, reasonably should have known was a potential result of the offense." *United States v. Treadwell*, 593 F.3d 990, 1003 (9th Cir. 2010). For losses resulting from an extensive fraudulent conspiracy, including a lengthy Ponzi scheme, U.S.S.G. § 1B1.3, in the context of calculating the amount of loss under § 2B1.1, requires the district court to make factual determinations establishing the scope of each defendant's joint undertaking and the amount of losses reasonably foreseeable to each defendant. Id.; see also United States v. Riley, 335 F.3d 919, 928 (9th Cir. 2003).

In the present case, $32,880,811.82 represents the net total of investments made by investors beginning in May 2009, offset by any money returned to those investors through the end of this fraud scheme. Rode knew, after Geringer's confession to him, that GLR no longer provided a diversified investment opportunity to its investors. Unless Rode continued to mail misleading account statements to victim-investors, they scheme would have collapsed. Rode knew that investors would be less likely to continue to in GLR, and, in fact, would likely demand the return of their investment, if he mailed truthful account statements. Therefore, all losses borne by investors post-May 2009 were reasonably foreseeable losses to Rode.

B. Number of Victims

Ninety-nine investor-groups invested money into the GLR Growth Fund. "Investor-groups" counts multiple investors from the same family as a single investor-group. Defrauding ninety-nine victims places Rode comfortably within the range for the four-point enhancement for number of victims under § 2B1.1(b)(2)(B).

C. Violation of Securities Laws

Under § 2B1.1(b)(19), the defendant's offense level is increased by four levels, since the offense involved a violation of securities laws and, at the time of the offense, the defendant was a person associated with either a registered broker dealer or investment advisor. The defendant agreed to this enhancement in his plea agreement.

IV. Sentencing Recommendation

The United States recommends a sentence of 78 months' imprisonment, followed by a three-year term of Supervised Release. The United States also recommends that the Court order the defendant to pay restitution in the amount of $32,880,811.82 made payable to specified victims (with necessary identification and contact information to be provided to the Court under separate cover), and the $100 special assessment. Rode should be held jointly and severally liable for this restitution with his co-defendants. Finally, the Court should order a money judgment. This money judgment should read: a sum of money equal to $32,880,811.82, representing the gross proceeds obtained as a result of the offense during the period of involvement.

A. 3553(a) Factors

The statute that governs imposition of sentence, 18 U.S.C. § 3553(a), sets forth factors this Court must consider in crafting a sentence that is "sufficient, but not greater than necessary" to comply with the objectives of sentencing. First, a sentencing court must consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense. 18 U.S.C. § 3553(a)(1) and (2)(A).

Under the 3553(a) factors, the government believes that several factors suggest that Rode deserves a variance to a sentence below guidelines. First, the seriousness of Rode's offense is different, and less serious, than Luck's offense, even though under U.S.S.G. § 2B1.1, the offenses should be calculated identically. Second, as part of Rode's settlement of the parallel civil matter with the SEC, Rode has been barred from practicing as an accountant before the Commission. Also, the government understands that a collateral consequence of Rode's fraud conviction is that he can no longer be a CPA in either state in which he is currently registered, Wisconsin or California. Therefore, Rode, even without the specific deterrence of a lengthy custodial sentence, will have a difficult time re-offending in a similar manner. Deterrence and public protection are achieved, at least in part, by the SEC Final Judgment and the termination of his CPA license.

Also, Rode had little control over how many investors Geringer and Luck recruited, or how much money these investors invested. Therefore, his Guidelines are driven, in part, by a loss figure over which he had less control than his co-defendants.

At the same time, Rode participated in a very serious fraud. Instead of being a diversified investment opportunity, the GLR Growth Fund was an investment fraud scheme. After May 2009, Rode knew that investors were being lied to both by Geringer and Luck during investment recruitment pitches, but also by the account statements he mailed to them.

B. Restitution

The United States also recommends that the Court order the defendant to pay restitution in the amount of $32,880,811.82 made payable to specified victims (with necessary identification and contact information to be provided to the Court under separate cover). Rode should be held jointly and severally liable for this restitution with his co-defendants. It is proper to hold Rode responsible for restitution for all losses resulting from any conduct that was part of the scheme. *United States v. Reed*, 80 F.3d 1419, 1423 (9th Cir. 1996) ("[W]hen someone is convicted of a crime that includes a scheme, conspiracy, or pattern of criminal activity as an element of the offense, the court can order restitution for losses resulting from any conduct that was part of the scheme, conspiracy, or pattern of criminal activity."); *see also United States v. Brock-Davis*, 504 F.3d 991, 998-99 (9th Cir. 2007).

C. Forfeiture

Finally, as discussed above, the Court should order that the defendant's sentence include a money judgment. This money judgment should equal $32,880,811.82, representing the gross proceeds obtained as a result of the offense during the period of involvement. As described in 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), the Court can now determine the amount of money that the defendant will be ordered to pay. The Court must find this amount by a preponderance of the evidence. *United States v. Garcia-Guizar*, 160 F.3d 511, 517-18 (9th Cir. 1998). Since there is no dispute that during the relevant time period, investors invested $32,880,811.82 (the total amount offset by money returned), the Court should adopt this figure as the forfeiture amount. Federal Rule of Criminal Procedure 32.2(b)(4) says that the forfeiture must be included in the oral announcement of the sentence and included in the judgment. *See United States v. Shakur*, 691 F.3d 979, 988-89 (8th Cir. 2012); *United States v. Ferguson*, 385 F. App'x 518, 530 (6th Cir. 2010); *United States v. Petrie*, 302 F.3d 1280, 1284 (11th Cir. 2002).

Forfeiture and restitution are distinct, and the defendant is not entitled to an offset against a restitution order to reflect the amount forfeited, or vice versa. *United States v. Newman*, 659 F.3d 1235, 1241-43, 1244 (9th Cir. 2011); *United States v. Pescatore*, 637 F.3d 128, 137 (2d Cir. 2011). Moreover, forfeiture is not a ground for reducing the defendant's period of incarceration. *United States v. Milo*, 506 F.3d 71, 74 (1st Cir. 2007); *United States v. Cacho-Bonilla*, 404 F.3d 84, 92 (1st Cir. 2005); *United States v. Bright*, 353 F.3d 1114, 1119 (9th Cir. 2004).

Therefore, the government requests the Court include the following language in the Judgment under forfeiture: 1. Money Judgment: a sum of money equal to $32,880,811.82, representing the gross proceeds obtained as a result of the offense during the period of involvement.

Dated: July 1, 2015

Respectfully submitted,

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